

***United States Court of Appeals  
for the Second Circuit***



**AMICUS BRIEF**



75-4049

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P/S

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,  
and CAPTAIN EUGENE L. COCHRAN,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,

Respondent.

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Nos. 75-4049  
and 75-4055

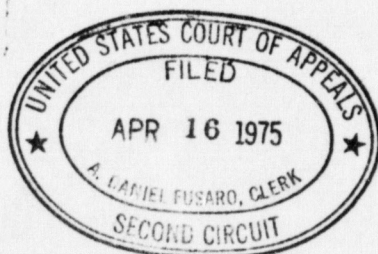
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On Consolidated Petitions To Review  
Order 75-2-127 of the Civil Aeronautics Board

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BRIEF OF AMICUS CURIAE

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COSTHA, The Council for  
Safe Transportation of  
Hazardous Articles

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IDENTITY OF AMICUS

COSTHA, the Council for Safe Transportation of Hazardous Articles, is a non-profit interindustry federation of trade associations and traffic conferences sharing a mutual interest in the safe shipment of small-packaged articles regulated under the applicable Hazardous Materials Regulations of the Department of Transportation (49 CFR 170-189, 14 CFR 103, and 46 CFR 146). Participants in COSTHA include the Drug & Toilet Preparation Traffic Conference, The National Small Shipments Traffic Conference, the Grocery Manufacturers of America, the National Association

of Food Chains, the American Retail Federation, the National Retail Merchants Association, the National Wholesale Druggists' Association, The Soap & Detergent Association, the National Motor Vehicle Manufacturers Association, the Eastern Industrial Traffic League, and the Cosmetic, Toiletries, and Fragrances Association. The addresses of each of these participants in COSTHA is given in the attached Appendix to this Brief.

COSTHA's participation as amicus curiae relates exclusively to the CAB Order which forms the subject of review, and the implications the decisions of this court will have upon persons governed by the regulations of the Department of Transportation, transportation users, and public safety generally. Although there is an interest of some participants in this proceeding regarding a specific shipment of a regulated radioactive material through the State of New York, COSTHA is unfamiliar with the particular circumstances of that incident and hereby specifically limits its interest to the general considerations being weighed by the court. That shipment was neither shipped by nor to any COSTHA participant and is unrelated in its specifics to the general concerns expressed by COSTHA herein.

STATEMENT OF THE ISSUE

The issue presented is whether, contrary to the ruling of the Civil Aeronautics Board, certificated air common carriers or their employees may collectively embargo or otherwise refuse to accept and deliver any articles which are regulated by the Department of Transportation/Federal Aviation Administration, notwithstanding the full compliance of such articles with all requirements of the Federal regulations and of the common carriers' tariffs, by which those carriers hold themselves out to the public to provide such transportation service as that refused by embargo.

STATEMENT OF THE CASE

This case is before the court upon the consolidated petitions of the Air Line Pilots Association, International, and Captain Eugene L. Cochran (referred to collectively herein as ALPA), to review and set aside a final order of the Civil Aeronautics Board (CAB), Order 75-2-127, issued on March 3, 1975. That Order rejected embargoes announced by several air common carriers, which would limit or curtail the acceptance and delivery by those carriers of substantially all shipments of materials regulated by the

Department of Transportation/Federal Aviation Administration  
(DOT/FAA) under its Hazardous Materials Regulations, 49  
CFR 170-189 and 14 CFR 103.

DOT/FAA HAZARDOUS MATERIALS  
REGULATIONS ARE BROAD IN SCOPE

DOT/FAA administers an integrated series of regulatory requirements, not minimum standards, binding upon shippers and carriers of hazardous materials by all modes of transportation and relating to the classification, description, packaging, marking, labeling, documentation, certification, inspection, handling, and stowage of a wide variety of materials. Articles are regulated by class of hazard only, as defined by specific test methods prescribed in the regulations. There is no small-quantity limit on the applicability of the regulations, and the most infinitesimal quantity of a regulated material will be fully regulated in air transportation. The lesser hazard of the small quantity for some classes of materials is recognized in the DOT/FAA safety regulations through partial exemptions from some requirements otherwise applied to that commodity in larger volumes. So-called "exempt" articles such as medicines and other pharmaceuticals, perfume, cosmetics, some liquors, household cleaners,

deodorant sprays, and the like, are not subjected to any restrictions in rail or highway transportation other than shipping paper documentation and certification. They are, however, fully regulated in air transportation.

These examples of medicines and common consumer commodities are not a bizarre example of the regulated items, mentioned merely for the sake of effect. Such products as are commonly found in grocery and drug stores make up a large percentage of the articles which are exempt from most surface requirements. That exemption from land regulations must be satisfied by the low hazard and small quantity of the material before there is any consideration of allowing its carriage aboard passenger aircraft. See 14 CFR 103.7. In such transportation, despite an exemption from labeling in surface carriage, these articles must be labeled. See 14 CFR 103.13. Shipping paper and certification requirements are applicable as well, and the operator of the aircraft must be advised in writing, before take-off, of the shipping name, class, quantity and location of the cargo. See 14 CFR 103.3 and 103.25.

Although not radioactive, many of these products are health-care items which must be transported safely and quickly. Especially in international transportation

and delivery to remote areas, air transportation is often the only viable transport mode. Air transportation is essential to the welfare of both shipper and receiver of these articles, in terms of specific needs for the commodities and the necessary employment assured by such commerce. Most articles lawfully carried aboard passenger-carrying aircraft are no different than the materials in the baggage of the passengers and crew, but have the benefit of special packaging, labeling, and documentation. Even unregulated they would pose no true threat to the health and safety of passengers and crew of the aircraft, and especially when tendered to the carrier as prescribed in the regulations, they are truly innocuous.

The Air Transport Association, representing many air common carriers including the ones whose embargoes form the subject of CAB Order 75-2-127, has noted that some cosmetics, for example, may no longer need to be classified as restricted articles. (See Attachment I, "Moving Hazardous Goods by Air: The Key Word Is 'Safety'", by George A. Buchanan, Vice President, Air Transport Association, published in April 7, 1975, edition of Traffic World Magazine.)

Key representatives of ALPA as well have acknowledged the overly wide scope of the DOT/FAA regulations. Captain James Eckols, speaking for ALPA at the DOT/FAA public

hearing held in Washington, D.C., on February 10, 1975,  
testified as follows:

We agree that there are certain items that happen to be classed in the area of hazardous materials that probably are not [hazardous]. But they are within the law and we are unable to give exemptions to just everything. We do not want to become a clearinghouse. We do not want to start issuing ALPA spec numbers. We think that's up to the Department of Transportation.  
(Hearing Transcript, Page 117)

Despite these representations, and the unquestioned fact that there are materials within the regulations which are not fairly placed there, they do currently constitute regulated materials and have taken the brunt of the embargo instituted by ALPA and carried forward by the air common carriers addressed in the CAB Order.

It is essential that the court be aware of this breadth of regulatory coverage, and that the court realize that the impact of its decision will fall most heavily upon this type of traffic. There may be specific materials under the regulations which ALPA or carriers or the court believe should be prohibited in air transportation, but the largest segment of regulated traffic that will be affected by a general decision in this case as it was by the embargoes, is the small-quantity consumer merchandise and health care products on whose behalf COSTHA is participating in this case.

If there are specific items of concern to the court or the petitioners in this proceeding, COSTHA respectfully urges consideration of them with specificity, to avoid the unintended impact of a generalized reaction on the small-quantity traffic described above.

TRANSPORTATION SAFETY REQUIRES  
UNIFORM APPLICATION OF  
DOT/FAA REGULATIONS

As noted earlier, the DOT/FAA regulations are integrated with consistent requirements applicable to the same materials transported through other modes of transportation. The specific requirements applicable to air transportation are coordinated with the other modes via DOT's Hazardous Materials Regulations Board, to assure the maintenance of a uniform set of controls on an essential aspect of international commerce. Such intermodal uniformity and consistency are necessary because no shipment of materials by air, for example, will originate and arrive at its destination only via air. That shipment must move via motor carrier in pick-up or delivery to the airport at least. It is not uncommon for a single shipment to be transported by three modes of carriage or more during its distribution from point of origin to point of final destination.

It is not unlikely that variations in requirements, at the discretion of air common carriers or pilots, would result in inconsistent and unlawful packing, marking, labeling, or documentation in other modes of transportation. Thus, although perhaps the air carrier and crew would be content, the shipment would be left in limbo when it came to a point of interchange with another mode of transportation.

The clear congressional intent in all statutes passed in this area has been to provide for public safety through uniform multimodal regulations, but to provide for the public needs for regulated materials by not stopping the flow of such commerce. When the intent of Congress was to stop the movement of any particular material altogether, or by mode of transportation, that intent was openly stated. See for example, 18 U.S.C. 832(b) and P.L. 93-633, Section 108.

The regulations issued pursuant to these laws are not "minimum standards" as ALPA would characterize them, but are for the most part minimum and maximum requirements. As an example, any material which is not required to be labeled must not be labeled (49 CFR 404(b)). A label must be in a diamond configuration, with each side no more and no less than 4 inches long (49 CFR 404(d)). A shipper must use that packaging specifically authorized in the regulations for shipment of that material, as determined

by the commodity, the volume to be shipped, and the mode of transportation to be used. He may not, at will, select another packaging which, in his opinion, is stronger than those specifically authorized for that material, unless he obtains specific permission from the Department of Transportation to do so. This may seem contrary to the interests of safety, but packaging and other requirements are authorized on the basis of the detailed characteristics of the product and the transportation environment, and many seemingly "better" packages perhaps would not be so if all the factors that went into the original package authorizations were known by that shipper. As an example, a light gauge DOT Specification 2P aerosol container may be prescribed for a material. If the shipper wishes to use a heavier gauge DOT specification 2Q aerosol container, the regulations do not permit him to make this substitution.

Compliance with safety regulations is intimately related to the comprehensibility of those requirements, and the capability of becoming familiar with them. The DOT/FAA regulations provide more than 280 pages of fine print, giving detailed instructions to shippers of regulated materials. The packaging specifications alone fill another 360+ pages of the Code of Federal Regulations. The system is undeniably detailed and complex, but it is capable of being learned and used, especially since most

shippers deal with a limited number of regulated products and therefore repetitively use a limited number of the overall requirements. ALPA cited historic difficulties in achieving compliance due to the complexity of the regulations, familiarity with the regulations, and the overlapping jurisdictions of a number of bodies. Each of these factors would be dramatically magnified if the position espoused by ALPA were to prevail, that air carriers individually, and crewmen individually, could establish their own regulatory requirements. The complexity would be increased as a function of the number of carriers and pilots, and the very task of assembling each of these requirements would be monumental, if at all possible. The need for familiarity with the regulations would be absolutely frustrated, since each carrier and crewman under the ALPA scheme could not only establish unilateral requirements but could change them at will. The overlapping jurisdictions which have troubled this regulatory area basically are those of the DOT/FAA, the CAB, and the International Air Transport Association (IATA). DOT/FAA and the CAB have begun to identify and segregate their relative roles in this area to the benefit of all. DOT/FAA and IATA are working closely to resolve variances between U.S. domestic air requirements and those imposed overseas. Where resolution is impossible, the discrepancies are being flagged and highlighted for all to recognize.

The problems ALPA cited with overlapping regulatory jurisdictions would only be compounded by adoption of the ALPA position, to the effect that each carrier and pilot could be a regulatory entity unto himself. Confusion and unintended noncompliance would reign, and public safety would be the victim. The regulatory role calls for consolidation and centralization of the development of binding requirements, not fragmentation. To once again quote Captain Eckols testimony at the February 10, 1975, public hearing: "We think that's up to the Department of Transportation." COSTHA wholeheartedly agrees. and consequently opposes the ALPA position in this proceeding, which would usurp and fragment the regulatory authority.

There must be one set of requirements, which are readily available, comprehensive, multimodal, and capable of generalized use throughout the transportation community. That one set should be administered and enforced by one lawfully responsible Federal body, and that body is the Department of Transportation. If ALPA or any other person has difficulty with the actions of DOT, then DOT should be the defendant in a court action, not the CAB.

COMMON CARRIAGE AND  
HAZARDOUS MATERIALS

Hazardous materials, when properly prepared and handled in accordance with the applicable Federal regulations, bear no more hazard in transportation by air than general commodities. It must be reiterated that no one expects or would allow any air carrier or pilot to accept cargo that is not in compliance with the regulations. The ironic result of the embargo imposed by ALPA and reflected by some air carriers is that the package which fully complies is denied transportation, but the hazardous material which complies with no requirements slips aboard the aircraft unseen. This, as an aside, is the prime reason COSTHA and others have opposed any embargo or other punitive measure unjustified by the needs of safety which is keyed to proper identification and labeling of the material—unscrupulous and desperate individuals (none of whom COSTHA speaks for) are tempted to go underground and hide the nature of their freight in an endeavor to obtain transportation. When a pilot, for example, blindly states that no labeled material will be permitted on his aircraft, COSTHA fears the danger from those unknown shippers who merely remove the label and thereby by-pass the pilot and the restriction. The good shipper, complying with all safety requirements and presenting

a safe package for shipment, is the one whose access to commerce is denied, not the slipshod operation which is the true safety problem in the first place.

The air carriers involved in CAB Order 75-2-127 are unquestionably common carriers, Federally certificated by the CAB to carry passengers and general freight. Their certification authorizes service to the exclusion of others who would serve that area. The common carrier certificate is reflected in the tariffs filed by the carriers, which is the mechanism by which the carrier holds himself out to the public as a publicly franchised operation. Many city-to-city air routes in the country are served by only one such carrier. Refusal of service by such a carrier is tantamount to denial of air transportation to the public.

The general rule of the common law, as implemented by regulatory statutes, is that a common carrier is under a duty to receive and transport any property tendered to it for transportation, provided the property is such as it holds itself out as willing to carry, or as it traditionally carries. 13 C.J.S. Carriers, §27. Common carriers hold their several properties and exercise their respective privileges and franchises subject to governmental control and regulation. Where a carrier devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must

submit to be controlled by the public for the common good, to the extent of the interest he has thus created. See 13 Am.Jur.2d Carriers, §21.

Both the common law and statutory codification of the common law prohibit any unjust discrimination by a common carrier in favor of or against any particular description of property they are certificated to carry. See, for example, §404 of the Federal Aviation Act of 1958, 49 U.S.C. 1374. The law recognizes that a common carrier's obligation to accept and deliver property which its certificate authorizes it to carry is not an absolute obligation. If, for example, for reasons beyond the control of the carrier, he is unable to provide the service, an embargo is authorized (14 CFR Part 228).

A common carrier, however, is not justified in refusing to transport property merely because it is subject to Federal safety regulations, and it is the common carrier's duty to accept such property for shipment when properly prepared for shipment. *Actiesselskabet Ingrid v. Central R. Co. of New Jersey*, 216 F. 72 (2d Cir. 1914), rehearing denied 216 F. 991, cert. denied 238 U.S. 615; *Ft. Worth & D.C. R. Co. v. Beauchamp*, 68 S.W. 502 (Tex. 1902); *The Ingrid*, 195 F. 596 (S.D.N.Y. 1912). ALPA has cited cases in its brief to the contrary from other circuits, but each of those cases predates the establishment of

the Federal regulatory scheme, and in any event are considered to be a minority view. In *Ingrid*, *supra*, at p. 75, this circuit noted that Congress has recognized the necessity for transportation of hazardous materials as legitimate articles of commerce by providing regulations therefor.

In the case law, the majority of instances in which this issue has been raised have involved discussion of the liability of the common carrier for damage resulting from any incidents relating to such carriage. Under the common law and statute, a common carrier is virtually an insurer of the persons and property being carried and tort liability attaches without a showing of negligence on the part of the carrier. This court, considering this doctrine in *Exner v. Sherman Power Construction Company*, 54 F.2d 510 (2d Cir. 1931) further elaborated on its position in *Ingrid*:

While the [*Ingrid*] opinion generally disapproved of *Fletcher v. Rylands* [L.R.3 H.L. 330], the decision rested mainly on the ground that the respondent was a common carrier, was obligated to take such [regulated] freight, and was therefore not liable if it stored it properly and has committed no acts of negligence. (At 514.)

See also 35 ALR3d 1177, and Restatement, 3 Torts §521, comment a.

Congress has determined that materials of a hazardous nature must be transported, albeit safely transported, in the public interest. The Congress has delegated the public authority to determine the nature and degree of restriction on the flow of such commerce to the Department of Transportation. DOT may institute new requirements on its own motion or through the request for such requirements via its procedural and rulemaking regulations (49 CFR 170). Any person, including an air common carrier or crewman, may petition the Department for the creation of new or varied restrictions. The rulemaking is an informal process under 5 U.S.C. 553, and no legal assistance or particular form is required in making such a request. Any person, especially an air common carrier or crewman, who believes a general safety problem exists in any aspect of the transportation of hazardous materials, is obligated to bring that matter to the attention of DOT with a request for responsive regulatory action. DOT/FAA, in its complaints against the embargoes of air carriers which led to the CAB Order before this court, noted that none of those carriers had brought any safety problem to the attention of DOT along the lines of their embargoes, nor had any filed anything which could be interpreted as a request for rule changes or restrictions to parallel those of their embargoes. As

of the date of this Amicus Brief, none of those air carriers has yet made such a request to DOT, the lawfully responsible agency to impose such limitations on hazardous materials transportation. If those carriers do feel a genuine safety problem exists, then their behavior in keeping it from the responsible agency is the height of irresponsibility. If, however, those air carriers imposed embargoes, not from a concern for safety, but to placate rather than discipline their employees, then the embargo provision of the CAB regulations was misused.

In the event of any person's awareness of an emergency condition compelling immediate restrictive action, which would not be consistent with the orderly due process of administrative law, DOT is empowered to take such immediate action. Pertinent to this power are the provisions of 5 U.S.C. 553(d), 18 U.S.C. 834(d), 49 U.S.C. 1485, and P.L. 93-633 §111(b). In the event DOT issues a final decision with which the petitioner does not agree, there are procedures for judicial review of that determination, without resort to end-runs of the administrative process through embargoes.

A certificated air common carrier and his employees, serving the public to the exclusion of others who would offer such service, may only refuse transportation to those

regulated articles which fail to meet every requirement of the DOT/FAA safety regulations, or which they reasonably believe on a case-by-case basis, on the facts of that case, may not meet the DOT/FAA requirements. No one would advocate compelling any carrier or crewmember to accept and transport any shipment which, on his educated interpretation of the regulations and on the facts relating specifically to that instance, is suspected of not meeting all Federal requirements. It is an abuse of the discretion and judgment accorded to carrier and crewman, however, to deny transportation to freight which is unseen, facts relating to which are unknown and unsought, prospectively and indefinitely into the future. This type of blind and unknowing discrimination is specifically prohibited by the common law and Section 404 of the Federal Aviation Act of 1958, and is unlawful in every sense. ALPA's embargo and those of the air common carriers in this CAB Order are in the nature of such blind denials of service, and therefore the CAB Order rejecting such embargoes was proper.

49 U.S.C. §1511

ALPA places heavy reliance upon Section 1111 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1511.

This section was added to the law to provide one of the few lawful mechanisms by which an air carrier may deny transportation to a person or property without thereby incurring liability for discrimination and refusal to fulfill its common carrier obligations. The pertinent portion of the section reads as follows:

Subject to reasonable rules and regulations prescribed by the Administrator [of the FAA], any such [common] carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

This section was placed into the law, as an exception to the common carrier's general obligation, to cope with the alarming problem of aircraft hijacking and acts of violence and terrorism involving aircraft. It is clearly an essential means to combat such problems and COSTHA agrees with this court's decision interpreting this section in *Williams v. TWA*, 509 F.2d 942 (2d Cir. 1975).

Section 1511 is an exception to the common carrier's obligation, as it is generally codified in Section 1374 of 49 U.S.C. Thus, the court's view is eminently correct where at page 948 of *Williams* the court noted:

...[W]e are of the opinion that Congress did not intend that the provisions of Section 1374 would limit or render inoperative the provisions of Section 1511 in the face of evidence which would cause a reasonably careful and prudent air carrier

of passengers to form the opinion that the presence aboard a plane of the passenger-applicant "would or might be inimical to safety of flight."

ALPA would have the court warp the nature and phrasing of this section to justify the broad embargo of restricted articles which its pilots and some air common carriers imposed. The section, however, was directed at a specific type of problem involving the security of the aircraft and its passengers and crew from acts of violence directed at that aircraft and those people. To take the provision from its obvious context as an aviation security measure and apply it to day-to-day commerce which is not designed to damage or injure, is to give a strained interpretation to such a selective exception to the general common carrier rule. COSTHA agrees that Section 1374 was not intended to limit Section 1511, but in fact, Section 1511 was intended to be a narrow limitation on Section 1374. As with all exceptions to such important and long-standing general rules, this one must be given a strict construction and should be read in the context in which Congress added it to the law. COSTHA does not believe that the Congressional concern with terrorism can be used to limit the carrier's obligation to provide service to ordinary commerce, as properly prepared restricted articles must be viewed.

Even if one were to consider application of the authority in Section 1511 to ordinary commerce, the interpretation sought by ALPA would not obtain. That interpretation is wholly dependent upon ignoring the qualifying phrase which introduces the exception:

Subject to reasonable rules and regulations prescribed by the Administrator [of the FAA]....

In *Williams*, the situation was one contemplated by the Congress in passing the amendment, i.e., an aviation security matter. There are, in fact, regulations issued by the Administrator regarding aircraft and airport security. See, for example, 14 CFR 121.538. Thus, TWA's refusal of passage to Williams was covered by the statute and was "subject to" the rules and regulations issued by the Administrator. ALPA would prefer to ignore the existence of these qualifying words, but in construing an exception to the common carrier's obligation, such critical qualifying language cannot be so lightly dismissed.

The regulations prescribed by the Administrator, if one were to apply Section 1511 to hazardous materials transportation at all, would be the Hazardous Materials Regulations. Those regulations prescribe the quantities, packaging, nature of materials, etc., which may be carried aboard passenger-carrying and all cargo aircraft. In

addition, those rules make it unlawful for any carrier to accept any regulated material that does not satisfy the full DOT/FAA requirements. In other words, the carrier's refusal to accept and deliver hazardous materials is qualified by the regulations of the Administrator, which advise him specifically which materials he must not accept under penalty of law. They do not advise him that, in his discretion, with no other basis than opinion and with no specific facts about any specific shipment, he may refuse such a specific shipment.

Inexplicably, ALPA wrongfully claims a "right" to accept an illegally prepared shipment. At page 35 of the ALPA brief, petitioner characterizes Section 1511 as follows:

As with the regulations themselves, this provision only deprives carriers of the right to accept hazardous materials which to not comply with the FAA's minimum safety standards. (Emphasis added.)

No air carrier, or crewman, has a "right" to accept non-complying hazardous materials, and the very concept is as dangerous as it is presumptuous. This obvious misunderstanding of a carrier's obligations and responsibilities under the law characterizes the misinterpretation ALPA chooses to give to Section 1511.

Assuming, only for the sake of argument, that the section means what ALPA seeks to have it mean, it still

fails to support the embargoes which form the subject matter of CAB Order 75-2-127. It is abundantly clear, from the wording of the section itself and the aviation security background to its adoption, that the section contemplates on-the-spot immediate decisions for which some latitude is necessary. Using the standard prescribed by this court in *Williams*, a carrier or crewman would have to have "actual evidence which would cause a reasonably careful and prudent air carrier of passengers to form the opinion that the presence aboard a plane" of a specific individual or piece of freight would or might be inimical to safety of flight. Without "actual evidence" about the instant situation, prospective and generalized refusal to carry any material or persons via an embargo, despite their compliance with full Federal requirements "interfere[s] improperly with the rights of shippers and receivers to engage in commerce, as well as the rights of all citizens to have our free enterprise system operate as efficiently as it can by affording the participants in it the widest possible latitude consistent with law." Ex Parte No. 272, 343 I.C.C. 692, 760, decided July 16, 1973.

### CONCLUSION

The CAB Order before the court for review rejected air common carrier embargoes as a misuse of the embargo provision of the CAB regulations (14 CFR Part 228), and as contrary to the common carrier obligations of those carriers to serve the public. The CAB properly found the embargoes to be an unlawful usurpation of the regulatory functions of DOT/FAA. None of these carriers were seeking to remove a specific shipment from air transportation, about which there was "actual evidence" of a danger to safety. The embargoes were all-encompassing, including within their denial the innocuous products commonly found in all passenger and crewmember baggage, as well as many small packaged items of vital importance to the health and welfare of broad segments of the public, even though such shipments fully satisfied all regulatory requirements imposed by DOT/FAA. In fact, transportation was denied especially because those shipments complied with the regulations, thereby signalling their presence by documents and color-coded warning labels.

As common carriers, occupying the transportation field to the Federally-enforced exclusion of competition and others who might provide alternative service, these carriers blindly denied the shippers, receivers, and the general public of their rights to commerce and a free

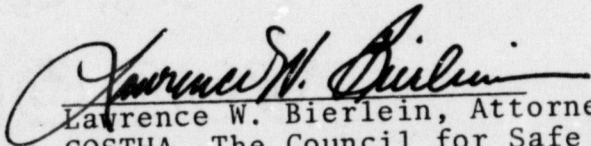
transportation system. Neither ALPA nor any of those carriers has made a specific showing of any safety problem applicable to any identifiable shipment which would justify the broad embargo of substantially all regulated materials. Furthermore, none of those carriers have taken the trouble to reiterate their purported concerns to the statutorily responsible agency in a request for responsive rule changes.

Most of the products of concern to COSTHA could be shipped by air without any regulation without lessening safety in air commerce. Those products, however unfairly or unnecessarily, are regulated and are classed, described, packed, marked, labeled, documented, and certified in accord with those regulations. The broad brush of the carriers' embargoes and the ALPA position in this proceeding constitute an unlawful interference with the rights of the public to engage in the safe shipment of these materials, and therefore CAB Order 75-2-127 should be affirmed.

WHEREFORE, in consideration of the foregoing, COSTHA urges this court to deny the petitions to review CAB Order 75-2-127 and to affirm the CAB conclusion in that Order.

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April 11, 1975

  
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APRIL 7, 1975

## Moving Hazardous Goods by Air: The Key Word Is 'Safety'



by George A. Buchanan,  
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Some of the most useful and commonly accepted instruments of modern life—from the family car to the power tools on the home workbench—have inherent in their operation elements of potential hazard that must be controlled through the diligent practice of safety.

Such an assertion is not cavalier. Recognizing the good in the automobile and the power saw, along with the potential hazard, gives us the incentive to develop the techniques that can reduce the risk to the least possible chance of occurrence.

Obviously, the same cycle of recognizing potential hazard in inherently useful products and developing means of controlling the hazard applies in freight transport—including the air freight transport of some 2,200 types of commodities—from newsprint ink to life-saving radiopharmaceuticals—that are strictly controlled with respect to labeling, packaging, handling and amounts that can be shipped aboard an aircraft.

As a service to shippers, *Traffic World* has asked the Air Transport Association to present the airline industry's philosophy and approach to the movement of potentially hazardous materials by air. ATA welcomes this opportunity. I believe the most helpful response will be a point-by-point review of an industry position statement on the air transportation of potentially hazardous materials adopted after a meeting on this subject by ATA member carriers. In the course of this review I will spell out some things the airlines can and cannot do for the shipper of potentially hazardous materials and the things which, under law, the shippers must do for themselves. I will also touch upon some recently enacted legislation in this area.

In a nutshell, the airlines' approach to the handling of potentially hazardous materials is summed up in the very terms we use in referring to them. Our tariffs refer to such commodities as "restricted articles" because some commodities—high powered Class A explosives, such as liquid nitroglycerin and dynamite, for example—are banned from movement in scheduled air service. Other commodities, such as electric

blasting caps, for example, are severely restricted on amounts that can move on a given flight. And, as I have just noted and will repeat for emphasis, government and airline regulations require special labeling, packaging and handling of potentially hazardous materials.

If all applicable regulations are adhered to, by shippers and carriers alike, the airlines believe the potential for hazard is removed. Any untoward incidents that we know of in relation to the movement of potentially hazardous material by air are directly traceable to non-compliance with regulations—particularly non-compliance by shippers. Where rules and procedures have been adhered to, we know of not a single case of injury to any passenger or airline employee.

New commodities coming into the air freight system and advances in safety technology make prudent the periodic and thorough review of regulations governing the movement of potentially hazardous materials. This was one of the reasons the airlines supported the national transportation safety act which was passed by Congress late last year and signed by the President early in 1975. The act centralizes regulatory authority on the transportation of potentially hazardous materials within the Department of Transportation—an obviously good step, given the safety benefits of having uniform, nationwide regulations and enforcing them across the board.

The act gives the Secretary of Transportation authority to promulgate any additional regulations that may be found to be necessary. As a logical first step, however, there should be a prompt and thorough review of existing regulations, as well as a new examination of all of the 2,200 commodities on the restricted articles list.

Such an examination could find that there is no longer any real reason for transporting fireworks or, in certain instances, corrosive liquids in air transportation. On the other hand, such a review might determine that certain types of cosmetics, for example, need no longer be classified as restricted articles. The urging of such a review was a key recommendation from the airline industry in developing our position

statement on the air shipment of potentially hazardous materials.

Let's consider the industry's policy in some detail. It consists of six points ranging from the need for better shipper education to who should monitor shipments of radioactive material. The first point, emphasizing safe transportation of people and goods as the prime objective of the U.S. scheduled airlines, is far from window dressing. Insuring that potentially hazardous materials are rendered safe for air transportation is inherent in the safety objective.

Asserting the safety objective is important because it supports a right the airlines insist upon. Our industry believes that any airline must have the right to go beyond existing federal regulations in the imposition of restrictions on the air transportation of potentially hazardous materials. The right should be exercised any time an airline believes additional restrictions are necessary to ensure safety.

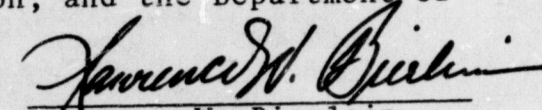
This is not a novel approach. In operating their aircraft, the airlines frequently employ standards higher than minimum standards prescribed by the Federal Aviation Administration. This is as it should be. For while the federal aviation act requires the FAA to prescribe minimum standards of safety, it also requires the air carriers to perform their services with the highest possible degree of safety.

Some airlines, in recent filings with the Civil Aeronautics Board, have sought to place additional restrictions on the movement of some potentially hazardous goods and have signified their intent to embargo entirely a few commodities permitted in air transport under current government regulations. Here, the interests of safety and common carrier responsibility appear in conflict.

The CAB has sometimes rejected the airline assertion of the right to impose restrictions beyond government minimums. The board has said on occasion that a shipment packaged and labeled in accordance with government regulations must be accepted by an air carrier. The airlines believe they have executed their common carrier

CERTIFICATE OF SERVICE

I hereby certify that I have mailed, this date, postage prepaid by first class mail, two copies of the foregoing Brief of Amicus Curiae, to counsel for the Air Line Pilots Association, International, and Capt. Eugene L. Cochran, the Civil Aeronautics Board, the Department of Transportation, and the Department of Justice.

  
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April 11, 1975